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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON
Secretary of the Interior,

Appellant,

vs.

STATE OF NEW MEXICO, et al.,

Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE HOPE RYDEN

THOMAS H. WAKEFIELD
Attorney for Hope Ryden
First Federal Building — Suite 2150
1 S. E. 3 Avenue
Miami, Florida 33131

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BRIEF OF AMICUS CURIAE HOPE RYDEN

The Amicus adopts the brief of the Appellant and says that at issue in this case is the question of the constitutionality of the Wild Free-Roaming Horses and Bur-

ros Act enacted by the Congress (December 15, 1971) pursuant to Article IV, Section 3 (the "Property Clause") of the Constitution. A copy of the act is set forth in Appendix F of the Appellant's Jurisdictional Statement.

INTEREST OF AMICUS CURIAE

The Amicus is a citizen and resident of the United States. She is a naturalist and has spent many years in studying at first hand the habits of wild horses on public lands that form the subject matter of the "Wild Free-Roaming Horses and Burros Act" and this litigation. She has authored two books on wild horses: "America's Last Wild Horses" (E. P. Dutton, 1970) and "Mustangs: A Return to the Wild" (Viking Press, 1972) and has written an article for the National Geographic Magazine (its issue of January, 1971) titled "On the Track of the West's Wild Horses," as well as other books and magazine articles on wildlife. Her interest as Amicus is on behalf of herself and the tens of thousands of other humanitarian Americans who seek to prevent the slaughter for "pet food and fertilizer" of the wild horses and burros that have sought refuge on the public lands of the United States and who, speaking through their Congress, enacted the "Wild Free-Roaming Horses and Burros Act," which New Mexico and others now seek to have declared unconstitutional.

QUESTIONS PRESENTED

(1) Did Article IV, Section 3, of the United States Constitution (the "Property Clause") give the Congress the right to regulate wildlife in the public lands, and if so:

(2) Was this regulatory power superceded by New Mexico's rights as trustee of the wildlife within its borders or obtained on its admission to the Union?

ARGUMENT

Article IV, Section 3, of the United States Constitution, provides in part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

At the time of the adoption of the "Property Clause," the public lands of the United States were teeming with fish, fowl and wildlife of all kinds. Indeed, the fur alone taken from such lands might well have been worth more than the land itself, and the meat from the wild game was one of the main sources of sustenance for the settlers. It seems inconceivable that the founders of the Constitution were ignorant of the existence of this wildlife on the public lands and therefore made no reference to it in the "Property Clause." It seems equally inconceivable that the founders intended the words "Territory or other Property belonging to the United States" to include only the fee simple title to the land itself (the rocks, soil, water, forests, minerals and vegetation of those lands) to the total exclusion of possibly their most valuable asset, namely, the wildlife. Yet such appears to be the contention of New Mexico and Nevada.

It is true that at the time of the adoption of the "Property Clause," wild animals, birds and fish in their natural state were not subjects of ownership (though they could become such by being reduced to possession) and therefore technically speaking were not "property" either real or personal as defined by law.

However, such a construction is not tenable in view of the clear meaning of the "Property Clause" which grants to the Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Obviously those words refer to the boundaries of the Territory and other Property of the United States and do not confine themselves exclusively to the fee simple title to such lands but on the contrary include Rules and Regulations respecting the wildlife which might be from time to time on those lands.

Having been granted the right to regulate wildlife on the public lands by the Constitution, has Congress lost that right to the State of New Mexico?

As pointed out by the Appellant, this Court in *Hunt v. United States, 278 U.S. 96*, held "that the government's authority over the public lands include the power to manage and control the deer population in the national forests and game preserves." However, New Mexico and Nevada as well as the learned District Judges interpret the Hunt rule as being applicable only in instances when necessary to protect the public lands from damage such as overbrowsing in Hunt with the consequent killing of "valuable young trees, shrubs, bushes and forage plants," and does not extend to protecting wild animals found on the lands.

The converse of the last mentioned interpretation should also be true, that is, the United States has the power to manage and control wildlife on the public lands which acts not to damage the land but to improve the young trees, shrubs, bushes and forage plants by fertilization from the fecal matter and bodies of thousands of wild horses and wild burros as well as to "protect the natural ecological balance of all wildife species which inhabit such lands."

In this connection, it is well known that animals are not an adjunct to, but an integral part of any ecosystem. Through photosynthesis, plants convert the energy of the sun into a form of energy which can be used by animal life. In return, the fecal matter and the ultimate disintegration of animal bodies replenish the soil with those elements that are essential to plant growth. Wherever man interferes with this natural recycling of nitrogen, the soil becomes depleted, and artificial fertilizers must be applied. The Appellees' interpretation that wild fauna on the public lands of the United States should be excluded from the protection of the Federal Government, while admitting that the Federal Government has the right to protect the wild flora on those lands, is, therefore, a specious one. It is the view of the majority of scientists today that ecosystems should be treated as intact units and managed as such.

However, regardless of the interpretation of the Hunt case, it would appear that:

(a) The "Property Clause" granted Congress the power to dispose of and make all needful rules and reg-

ulations respecting the public lands, including the wildlife thereon;

(b) Such delegated power has never been transferred to New Mexico;

(c) New Mexico's claim as trustee of resident wild animals on public lands for the benefit of the people of the State and its police power are second, subordinate, junior and inferior to the paramount power of Congress to make needful rules and regulations respecting the public lands including the wildlife thereon; and

(d) The Wild Free-Roaming Horses and Burros Act enacted by Congress pursuant to the "Property Clause" is constitutional.

THE COMMERCE CLAUSE

Apparently no evidence was introduced before the District Court with respect to the migratory character of wild horses and wild burros.

It is requested that this Court take judicial notice of the migratory habits of those animals.

A typical herd of wild horses is made up of three types of lesser social units. These are: the stallion-dominated-harem, the stud band and the lone animals. In respect to the territoriality of wild horses, the behavior of each of these social units differs.

Members of a stallion-dominated-harem seasonally occupy a home range. During spring and summer, stal-

lions that have gathered harems of mares defend their home ranges from other stallions. Thus the animals maintain space around themselves and (unlike domestic animals) avoid overgrazing the land which supports them. In the fall, however, these small social units abandon their land claims and move to fresh pastures (regardless of state lines) where they often coexist with other stallion-dominated-harems, rotating land use. It is not unusual to see two or three such harems coexisting on common ground from their former haunts.

The stud bands behave differently. A stud band is comprised of surplus males (such a surplus is inevitable where a few males have acquired harems). These surplus horses, being sociable by nature, attach themselves to one another and range far and wide. These stud bands are not territorial and migrate whenever they choose.

The third type—the lone animals—are usually old, defeated stallions who have lost their harems in battle and have been driven onto undesirable sections of land. These loners tend not to move about much. In the winter they will join the herd as it congregates on new ground.

Thus it can be seen that wild horses are not strictly territorial and that their movements are biologically purposeful and guided by inner signals which quite naturally defy state boundaries. While conducting my field studies on wild horses during the years 1968, 1969 and 1970, I encountered several wild horse herds that were occupying two states.

For example, along the Montana-Wyoming border, the Pryor Mountain wild horses inhabit the State of Mon-

tana, but make daily treks to the only available water hole which is located in the State of Wyoming.

Another case of dual state residency came to my attention when I sent queries to Bureau of Land Management offices throughout the West seeking locations of wild horse herds on public lands. In response to my questionnaire, two Bureau of Land Management district offices, one in California and one in Nevada, reported the same band of wild horses to be inhabiting their respective states.

In the Bookcliff Mountains along the Colorado-Utah border, wild horses have long existed on both sides of the state line.

And even on the East coast, wild ponies, descendants of survivors of a 17th Century shipwreck, inhabit both the Maryland and the Virginia sections of Assategue Island.

It has been estimated that in times past some two million wild horses in the same time period roamed the plains and mountains from the Mississippi River to the Pacific Ocean and must have crossed and recrossed the then imaginary state lines. The Indians mounted on the ancestors of the horses in question had the reputation of being among the finest light cavalry in the world and invoked the astonishment and profound respect of the American Cavalry Officers during the Indian wars for their bravery, endurance, dash and the vast distances covered.

Accordingly it would appear that the wild animals mentioned in the Wild Free-Roaming Horses and Burros Act come within the scope of Congress' legislative authority to regulate interstate commerce and should it be decided otherwise and should the judgment of the District Court be affirmed, the meat from their slaughtered bodies soon will be the subject of interstate commerce.

CONCLUSION

The judgement of the District Court should be reversed.

Respectfully submitted,

HOPE RYDEN
AS AMICUS CURIAE
345 E. 81 Street
New York, N.Y. 10028

THOMAS H. WAKEFIELD
Attorney for Hope Ryden
First Federal Building, Suite 2150
1 S.E. 3 Avenue
Miami, Florida 33131